

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERCY SYLVESTER SHEPARD,

Defendant-Appellant.

UNPUBLISHED

December 15, 2011

No. 299933

Kalamazoo Circuit Court

LC No. 2008-001019-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, for failing to pay child support, MCL 750.165. The trial court sentenced defendant to 90 days in jail, with credit for 58 days, and 3 years' probation. Defendant was also ordered to pay costs and restitution. Defendant appeals of right and for the reasons set forth in this opinion, we affirm.

Defendant's conviction arises from his failure to pay child support as ordered for one of his 11 children. Defendant first contends that he is entitled to a judgment of acquittal notwithstanding the verdict because the jury verdict was against the great weight of the evidence. Because defendant failed to raise this issue in a motion before the trial court, however, the claim is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A conviction for failing to pay child support requires the prosecution to show that: (1) the defendant was under court order to pay support for a child; (2) the defendant had notice of the support order; and (3) the defendant failed to pay the support either in the amount required or at the time stated in the order. MCL 750.165.

When addressing a claim that a verdict is against the great weight of the evidence, a reviewing court must determine "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury." *Id.* at 642. Exceptions include testimony that conflicts with indisputable physical facts or physical realities

or is so inherently implausible that a reasonable jury could not believe it. *Id.* at 643-644; *Musser*, 259 Mich App at 218-219.

In this case, both the Friend of the Court enforcement officer assigned to defendant's case and defendant's ex-wife testified that defendant was required by court order to pay support for the child and that defendant had failed to make payments as required by the order. The enforcement officer also testified that defendant signed two separate consent orders acknowledging that he owed back support and agreeing to make monthly payments. This testimony is not inherently implausible, particularly because defendant himself admitted to missing payments and acknowledged that some arrearage existed, although he disputed the amount. The prosecution's evidence was further supported by the admission into evidence of two court orders for child support and an affidavit of arrearages showing the amount of back support owed by defendant.

Defendant contends that the enforcement officer's uncertainty as to the allocation of past payments, more specifically, a payment in the amount of \$3,000 on April 1, 2005, created a question as to whether payments under the order were properly accounted for and raised doubt as to the amount, if any, that defendant actually owes. However, in light of defendant's admissions at trial and the other evidence presented, any uncertainty as to the allocation of payments only went to the question of the amount owed by defendant, and not whether defendant was in full compliance with the support order. Consequently, defendant has failed to establish that the evidence preponderated so heavily against the verdict that it would be an error to allow the verdict to stand, and he has not demonstrated that exceptional circumstances exist to seriously undermine the jury's credibility determinations. *Lemmon*, 456 Mich at 643-644. Accordingly we find no plain error and defendant is not entitled to a new trial.

Defendant's discussion of the issue, as presented in his appellate brief, also encompasses an argument that insufficient evidence supports his conviction. No special action is required to preserve challenges to the sufficiency of the evidence supporting a conviction. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). However, because this issue was not raised in the question presented in defendant's appellate brief, it has not been properly presented for review on appeal. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, on review, we find the evidence is sufficient to support defendant's conviction.

Claims of insufficient evidence are reviewed de novo. *Hawkins*, 245 Mich App at 457. A Court reviewing the sufficiency of the evidence must view the evidence in the light most favorable to the prosecution and determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Two court orders for child support were admitted into evidence and defendant testified that he was aware of his obligation to pay support. As previously discussed, evidence was presented that defendant failed to make payments as required, and an affidavit of arrearage showing an amount owed was admitted into evidence. This evidence is sufficient to support a rational jury's finding that defendant was under a court order to pay support, defendant had notice of that order, and defendant failed to pay either in the amount required or at the time

stated in the order. MCL 750.165. As such, when viewed in the light most favorable to the prosecution, sufficient evidence was presented to support defendant's conviction.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello